

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1089

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against-

ALAN GREGORY MARTIN,

Appellant.

B
PYS
Docket No. 76-1089

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the magistrate erred in holding that intent to cause injury is not an element of assault by striking, and in failing to determine whether such intent was proven in this case.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Whitman Knapp) rendered December 29, 1975, affirming without opinion the judgment of the United States Magistrate's Court for the Southern District of New York (The Honorable Gerald L. Goettel) rendered April 21, 1975, after a non-jury trial, finding appellant Alan Martin guilty of one count of assault by striking, beating, or wounding on territory within the jurisdiction of the United States, in violation of 18 U.S.C. §113(d). Appellant Martin was sentenced to ninety days' incarceration, and is released on bail pending appeal.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Martin was arrested on March 8, 1975. On or about March 10, 1975, a complaint was filed in the Southern District of New York charging him with assault by striking, beating, and wounding one Charles Francis Nergelovic at the Castle Point Veterans Administration Hospital, in violation of 18 U.S.C. §113(d). (A copy of the complaint is B of the

separate appendix to appellant's brief).

When the non-jury trial commenced before United States Magistrate Gerald L. Goettel on March 20, 1975, the court and counsel engaged in a colloquy concerning the definition of "assault" as it is used in 18 U.S.C. §113(d). Defense counsel urged that, as in New York State criminal law, some proof of corporeal injury, or at least intent to cause corporeal injury, was required under subsection (d). The Government disputed this, insisting that mere evidence of any striking was sufficient (4-6*). The court reserved decision on this issue (5).

The Government then called its first witness, Pearl Merriweather, a nurse at Castle Point Veterans Administration Hospital (7).** Ms. Merriweather testified that in early March 1975 she was sharing an apartment with Alan Martin and that, during the early morning hours of March 8, 1975,*** she and Mr. Martin had an argument there (13).

*Numerals in parentheses refer to pages of the transcript of the proceedings before Magistrate Goettel prepared from the tape recordings of those proceedings.

**Both parties stipulated that the Castle Point Veterans Administration Hospital was within Federal jurisdiction.

***The court noted that the complaint listed this date as February 8 in one paragraph and as March 8 in another paragraph (9). Defense counsel argued that this was a fatal flaw in the complaint (9-12). Over defense counsel's objection, the Government moved to amend the complaint by changing "February 8" to "March 8." The court reserved decision on both motions (12), later holding that the error had not been prejudicial.

Later that day, while Ms. Merriweather was working at the Veterans Hospital, she encountered appellant Martin in the basement of that building (13). Martin told her that he had brought her car and would pick her up after she finished work (15). She declined this offer and went upstairs (15). Shortly thereafter, Mr. Finch, apparently a co-worker of Ms. Merriweather's at the hospital, told Ms. Merriweather that Martin had asked to speak to her again (16). She then met Martin on the corridor of Ward D-2, where he again said he would pick her up after work. Again she refused (16). According to Ms. Merriweather, Martin also asked her to "call the police officers off," which she interpreted to mean that Martin thought she had reported him to the police for driving her car (16-17). Ms. Merriweather then returned to work (17).

Approximately ten minutes later Martin again approached Ms. Merriweather on the corridor of Ward D-2, and again repeated his request to pick her up after work (18). Ms. Merriweather testified that during this last conversation, she noticed "something" in Martin's hand which she "thought" was a knife (19). She was unable, however, to identify the knife produced by the Government as the "something" she had seen in Martin's hand (20-22). According to Ms. Merriweather, after this last conversation, Martin walked away down the corridor (19).*

*Defense counsel repeatedly objected to Ms. Merriweather's testimony as irrelevant to the charge of assault on Charles

The Government's next witness was Charles Nergelovic, a hospital officer at the Castle Point Veterans Administration Hospital (18). Nergelovic testified that at or about 4:15 p.m. on March 28, 1975, he received a radio communication that a white male was brandishing a knife on Ward D-2 (29). Nergelovic and one Officer Newkirk thereupon proceeded to the ward, each using a different staircase (30-32). After entering the corridor and speaking to Ms. Merriweather, Nergelovic approached appellant Martin and asked him if he had a visitor's pass (31-33). When Martin gave no reply, Nergelovic asked him his name and what he was doing there. When Nergelovic received no answer to these questions, he then asked Martin if he had a weapon, to which Martin responded, "That is for you to find out. Come and get me" (33-34). At approximately this time Officer Newkirk arrived. Nergelovic ordered Martin to "position himself on the wall" (34-35). After Martin assumed a spread-eagle position with his hands against the wall, Newkirk proceeded to frisk him (35). According to Nergelovic, while Newkirk was conducting this frisk, Martin pushed himself away from the wall. As Martin pushed himself away, his arms swung back, and one arm came into contact with the neck and right arm of Nergelovic (35, 48) who, together with Newkirk, was at

(Footnote continued from the preceding page)

Nergelovic, for which appellant Martin was being tried. The court allowed the testimony, "subject to connection."

that moment moving forward behind Martin in an effort to push him back against the wall. Nergelovic testified that Martin was not facing him at the moment of this contact (46). After a subsequent scuffle, appellant Martin was handcuffed and placed under arrest for assault (35). Nergelovic testified that he suffered no bleeding or even bruises as a result of his contact with Martin (54). No pain or injuries of any kind were attested to.

Government's final witness, James Darcy, was a patient at the hospital. Darcy observed the encounter between Martin and Officers Newkirk and Nergelovic (55-58). Darcy testified to essentially the same chronology of events Nergelovic had described, adding that Martin appeared to have swung his arms away from the wall in an attempt "to get away" (61). Darcy also testified that he thought Martin had "struck Officer Newkirk," but that Newkirk had told Darcy he had not been struck (61).

After the Government rested, defense counsel moved for a judgment of acquittal on the ground, inter alia, that there was no evidence that appellant Martin had the intent to cause physical injury which is requisite to a conviction for assault (66-68). In the ensuing colloquy on this motion, Magistrate Goettel stated that he thought the Government had proved "a rather clear resisting arrest," but that 18 U.S.C. §1115, the resisting arrest statute, does not apply to arrests by Veterans Administration police officers and the officers in this case

did not tell Martin he was under arrest until after the encounter (68). When the Assistant U.S. Attorney argued that "there is definite testimony there was a striking," the magistrate replied, "Yes, but not that it was intentional." Referring to the testimony that appellant Martin's arm struck Officer Nergelovic as Martin was pushing himself away from the wall, Magistrate Goettel stated that "that striking could have been accidental" (70).^{*} The magistrate reserved decision on the motion for a judgment of acquittal, adding that he interpreted 18 U.S.C. §113(d) to require proof of "intentional striking with intent to injure" (73).

To assist in the court's consideration of the motion, both parties submitted post-trial memoranda of law. Defense counsel argued, inter alia, that the Government had introduced no evidence of intent to cause injury, and that such intent is a requisite element of the crime charged.^{**}

^{*}Although there was no testimony as to any "striking" during the subsequent "scuffle," Magistrate Goettel also expressed his belief that

... there obviously was a certain amount of striking during the scuffle that followed in which the defendant was attempting to prevent himself from being held in custody. But that seems to me to be mere simple assault [18 U.S.C. §113(e)] rather than assault by striking [18 U.S.C. §113(d)]."

(70-71).

^{**}The memorandum for appellant Martin is D to appellant's separate appendix.

On April 21, 1975, Magistrate Goettel issued a written decision,* denying, inter alia, the defendant's motion for a verdict of acquittal and finding Martin guilty of the crime charged. On the question of intent, the magistrate held that conviction under §113(d) requires only "general intent," which he defined as meaning that "the defendant new, or could reasonably foresee, that his actions might have the forbidden consequence..." (Id. at 4). In concluding that Martin had such intent, the magistrate found that "it was reasonably foreseeable [to Martin] that, by swinging around with upraised arms, defendant would strike one of the officers," and that it would be reasonable to infer from Martin's actions that he "intended an assault" (Id. at 4-5). This finding as to intent, however, did not include a finding that Martin had intended to cause injury. To the contrary, the magistrate held that

... since a violation of §113(d) requires only a general intent, a violation may be found "without regard to whether it was specifically intended that [defendant's] act in the particular instance would issue in serious injury.

(Id. at 6).

Consequently, Magistrate Goettel failed to determine whether such intent was established in this case.

On December 29, 1975, the United States District Court for the Southern District of New York (Knapp, D.J.) affirmed appellant Martin's conviction without opinion.

*The written opinion is C to appellant's separate appendix.

ARGUMENT

THE MAGISTRATE ERRED IN HOLDING THAT
INTENT TO CAUSE INJURY* IS NOT AN
ELEMENT OF ASSAULT BY STRIKING, AND
IN FAILING TO DETERMINE WHETHER SUCH
INTENT WAS PROVEN IN THIS CASE.

Appellant Martin was charged with one count of assault by striking,** in violation of 18 U.S.C. §113(d). In seeking a verdict of acquittal, defense counsel repeatedly argued, inter alia, that intent to cause injury was a necessary element of the crime charged, and that the Government had failed

*Magistrate Goettel specifically held, in his decision finding Martin guilty of the crime charged, that it was not necessary to show intent to cause "serious injury," quoting that phrase from United States v. Parker, 359 F.2d 1009, 1013 (D.C. Cir. 1966). However, the magistrate's decision, read as a whole, clearly establishes his belief that intent to cause any injury, whether serious or not, is not an element of the crime charged, particularly since the magistrate never found that such intent had been proven in this case and never mentioned such an intent as one of the elements of this crime.

**Both the complaint and the Government's theory of the case at trial were that the alleged "assault by striking" occurred when, as appellant Martin was pushing himself away from the wall, his arm struck Nergelovic's neck and arm. The magistrate, in his written decision, found that the crime occurred at that instant. If this Court accepts appellant's arguments that that finding was erroneous, the Government is precluded from arguing alternatively that the conviction can be sustained because of the evidence of an ensuing "scuffle" between Martin and the two officers. At no time in the complaint or during trial did the Government claim that the charged assault occurred during that scuffle. There was no testimony as to any assaultive striking, as opposed to mere resistance to being handcuffed, during that scuffle. Moreover, the magistrate made no finding that an "assault by striking" was committed during the scuffle.

to prove that element in this case.*

Although the magistrate stated at one point during the proceedings that he interpreted §113(d) to require proof of an "intentional striking with intent to injure" (emphasis added) (73), he subsequently concluded, in his written decision convicting Martin, that intent to injure was not an element of §113(d). In that decision, Magistrate Goettel held that conviction under §113(d) required only "general intent," which he defined as meaning that "the defendant knew, or could reasonably foresee, that his actions might have the forbidden consequence...." In concluding that Martin "had the requisite general intent for a violation of §113(d)," the magistrate found that "it was reasonably foreseeable [to appellant Martin] that, by swinging around with upraised arms, defendant would strike one of the officers," and that it would be reasonable to infer from Martin's actions that he "intended an assault." The magistrate made clear, however, that neither his definition of assault nor his findings as to intent in this case encompassed a finding that appellant Martin had intended to cause injury. To the contrary, the magistrate

*Defense counsel raised this argument at the pretrial colloquy (4-6), the post-trial colloquy (66-73), and in his memorandum in support of a verdict of acquittal (Appendix D at 4). He also argued at various points during the trial proceeding that actual injury and intent to strike were also elements of the crime charged.

stated that

[s]ince a violation of §113(d) requires only a general intent, a violation may be found "without regard to whether it was specifically intended that [defendant's act] in the particular instance would issue in serious injury."

(Appendix D at 6).

He consequently failed to determine whether such intent was established in this case.

Since intent to cause injury is an element of assault by striking, the crime proscribed in §113(d), the magistrate's conclusion that this element was not requisite to conviction under that provision and his failure to determine whether this element was proved beyond a reasonable doubt in this case are errors requiring reversal of Martin's conviction.

"Assault" is defined as "an intentional, unlawful offer of corporal injury to another by force." The "intention to harm is of the essence." BLACK'S LAW DICTIONARY, 147 (Revised 4th ed. 1968). That an intent to harm or cause injury is an essential element of this crime has repeatedly been confirmed by the Federal courts. In United States v. Bamberger, 452 F.2d 696, 699 (2d Cir. 1971), this Court held:

Thus, a person who, in fact, has the present ability to inflict bodily harm upon another, and wilfully threatens or attempts to inflict bodily harm upon such person may be found guilty of forcibly assaulting such person.

(Emphasis added).

See also United States v. Johnson, 462 F.2d 423, 426 (3d Cir.

1972); United States v. Marcello, 423 F.2d 993 (5th Cir. 1970); Burke v. United States, 400 F.2d 866, 868 (5th Cir. 1968), cert. denied, 395 U.S. 919 (1969); Guarro v. United States, 237 F.2d 578 (D.C. Cir. 1956). Moreover, the words used to qualify the assault proscribed in §113(d) -- "striking, beating or wounding" -- reinforce the conclusion that at least for this type of assault, the intent to cause injury is an essential element. Were such not the case, Congress would have included more neutral terms, such as "touching" or "shoving" in the list of qualifying words.

The magistrate's conclusion in the present proceeding, that intent to cause injury is not an element of the crime of assault by striking, was based on the magistrate's misinterpretation of United States v. Parker, 359 F.2d 1009, 1013 (D.C. Cir. 1966); United States v. Alsondo, 486 F.2d 1339, 1345 (2d Cir. 1973), and United States v. Bamberger, 452 F.2d 696, 699 (2d Cir. 1971), the three cases he cited as authority for his holding.

The portion of United States v. Parker, supra, quoted by the magistrate, did not define §113(d), the crime charged here, but rather defined §113(c), assault with a deadly weapon -- a distinctly different crime. In Parker, the District of Columbia Circuit found that "the gist of [§113(c)] is found in the character of the weapon with which the assault is made." The proscription of §113(c) was based on legislative concern that "use of such weapons, even when there is no specific in-

tent to employ them to inflict injury, is invariably fraught with the possibility of dangerous consequences." Id., 359 F.2d at 1012. Thus, the Court of Appeals concluded that

[w]hether those weapons are used purposely to inflict injury or only recklessly, if the other elements of an assault are present, the conduct still falls within the ambit of the statute.

Ibid.

The terms of this holding and the logical inference coming from "use of a deadly weapon" limit its application. The holding is not applicable to assault by striking, the crime with which appellant Martin was charged. To the contrary, the Parker court, by holding that proof of the use of a deadly weapon relieved the Government of proving intent to cause injury, clearly implied that convictions for other forms of assault not predicated on use of a deadly weapon would require proof of such intent.

The magistrate's erroneous interpretation of United States v. Alsondo, supra, and United States v. Bamberger, supra, as establishing that intent to injure is not an element of the crime of assault stems from his failure to appreciate the broad scope of the criminal statute being interpreted in those cases. That statute, 18 U.S.C. §111, proscribes not only assault, but also resisting arrest and interfering with the duties of an officer. These latter crimes do not require proof of intent to cause injury, and may thus be satisfied by proof of a "mere touching" (Bamberger) or a "shove" (Alsondo). How-

ever, specifically addressing the crime of assault, the Ba-
berger court found that a defendant would be guilty of that
crime only if he "wilfully threatens or attempts to inflict
bodily harm." Id., 452 F.2d at 699. The same conclusion was
reached by the Third Circuit in United States v. Johnson,
supra, 462 F.2d at 426, in which that court approved a charge
which distinguished assault from the other acts proscribed by
§111 on precisely this element, saying:

An assault under our law is defined as an
attempt or an offer with unlawful force or
violence to do bodily injury or physical
injury to another.... [I]t is an offer or
attempt to do bodily harm.

Thus, although a defendant might properly be convicted of re-
sisting arrest or interfering with the duties of an officer
under §111 without proof of intent to cause injury, that de-
fendant would not be guilty of assault under either §111 or
§113(d) unless such intent were proven.

Because the magistrate failed to recognize that intent
to cause injury is an element of §113(d), and subsequently
failed to determine whether the Government had established
that element in this case, appellant Martin's conviction must
be reversed. Cf. United States v. Elmore, Doc. No. 75-1114,
slip op. 1873, 1886 (2d Cir., February 13, 1976); United States
v. Clark, 475 F.2d 240, 250 (2d Cir. 1973).

CONCLUSION

For the foregoing reasons, the judgment of the magistrate must be reversed and the complaint dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

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